STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2006
v	No. 259970 Montcalm Circuit Court
TIMOTHY JON BODMAN, Defendant-Appellant.	LC No. 04-001168-FC

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) or (b); three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); and two counts of attempted CSC II, MCL 750.92; MCL 720.520c(1)(a). He was sentenced to concurrent prison terms of 18 to 50 years for each of the CSC I counts, 10 to 15 years for each of the CSC II counts, and 3 to 5 years for each of the attempted CSC II counts. Defendant appeals as of right. We affirm.

Defendant first contends he was denied the effective assistance of counsel because his trial counsel failed to object at an earlier point to the prosecutor's alleged leading questions of the youngest complainant. We disagree. Because defendant failed to move for a new trial or an evidentiary hearing on the issue of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and any defendant seeking to prove otherwise bears a heavy burden. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). First, defendant must show that counsel was deficient. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense."

Id. at 687. Specifically defendant must show a reasonable probability that but for counsel's performance, the result of the proceeding would have been different. *Id.* at 694.

Leading questions are appropriate when they are necessary to develop testimony. MRE 611(c)(1). Because of the witness's young age, the embarrassment she presumably felt from having to discuss sexual topics in front of an audience, and her general discomfort with testifying, the witness often had difficulty expressing what happened to her, was unable to answer the questions, or gave incomplete answers. Consequently, the majority of the complained of questions were not meant to suggest an answer but, rather, were properly used to ask the question in a simpler form, recollect the witness' previous statements, or attempt to get her to expand on her yes and no answers. Regardless, even if some of the questions were leading, "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Moreover, it is possible that part of counsel's trial strategy was to try to make few objections during this child's testimony. Counsel may not have wanted to appear as an obstructionist, or she might not have wanted the jury to resent her for compounding the young victim's trauma of testifying. This Court will not "substitute[] its judgment for that of counsel regarding matters of trial strategy, nor make[] an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, defendant was not denied effective assistance of counsel when counsel failed to immediately object to the prosecutor's alleged leading questions of the child witness.

Defendant also contends he was denied effective assistance of counsel because counsel consented to keeping a juror after the juror was caught sleeping during trial. We disagree. Defendant did not move for a new trial or an evidentiary hearing on this issue, and therefore this Court's review is limited to mistakes apparent on the record.[1] *Cox*, *supra* at 453. It is not clear from the record when the juror began sleeping, how long the juror was sleeping, or whether she missed any testimony. Moreover, the victims presented undisputed testimony as to the sexual abuse and rapes. Therefore, based on the information apparent from the record, defendant has not shown that he was prejudiced by counsel's consent to keeping the juror at issue in the pool because it is not clear that juror missed any critical testimony. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (the defendant has the burden of showing the factual predicate for an ineffective assistance of counsel claim). Further, trial counsel may have had sound strategic reason not to seek to remove the juror at issue. Particularly, counsel may have thought that confusion in the juror's recollection due to her sleeping through testimony and/or being tired would render her more likely to have a reasonable doubt about defendant's guilt due to missing incriminating evidence.

[1] We note that defendant characterizes the juror as "sleeping" or being "asleep" during trial. However, when the prosecutor made a record of the juror's conduct, the prosecutor characterized it as "dozed off." Without any additional record in the trial court or an evidentiary hearing, we cannot conclude that the juror was sleeping through the trial.

Defendant also contends he was denied his right to an impartial jury because of the sleeping juror. However, the record clearly reflects that defense counsel consented to the juror at issue remaining on the jury. Thus, to the extent that defendant presents argument distinct from his ineffective assistance of counsel claim as to this matter, defendant's argument has been waived. See *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000), quoting *New York v Hill*, 528 US 110, 114-115; 120 S Ct 659; 145 L Ed 2d 560 (2000) (explaining that, absent a showing of ineffectiveness, trial counsel can generally waive a defendant's rights regarding the conduct of a trial). Such waiver extinguishes any possible error in this regard. *Id.* at 216.

Defendant next contends the court erred by asking an expert witness questions that, according to defendant, bolstered the ten-year-old complainant's credibility. We disagree. Generally, in order to preserve an issue for appeal, it must be raised before the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In this case, defendant did not object to the court's questioning of the witness. Therefore, the issue was not preserved for appeal. However, this Court will review unpreserved issues that could result in a denial of a fair trial. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). Such unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"The court may interrogate witnesses whether called by itself or by a party." MRE 614(b). However, the court's questioning of a witness should not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Although a court may question a witness in order to clarify testimony or elicit additional relevant information, the court "must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial. . . . The test is whether the judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, . . . and whether partiality *quite possibly could* have influenced the jury to the detriment of defendant's case." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992) (internal quotes and citations omitted) (emphasis in original). "A trial court may not assume the prosecutor's role . . . ." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994).

In this case, the ten-year-old complainant testified to three episodes of sexual abuse where defendant touched her vagina with his fingers, but she did not testify in court as to any genital-to-genital contact. One of the expert witnesses testified that during his visits with the victim, she used anatomically correct dolls to show that there was genital-to-genital contact between her and defendant. The court asked the expert to provide reasons for the apparent discrepancy. The court then summarized what it believed the expert was attempting to say. The court's questions were neither intimidating nor argumentative. Rather, the court was attempting to assist the jury in understanding a complex issue, specifically why a child witness's testimony could differ depending on with whom she is speaking. Thus, the trial court's questions were not improperly partial.

Finally, defendant argues that the trial court erred in scoring offense variable seven (OV 7) of the sentencing guidelines at 50 points. We disagree. "We review the trial court's scoring of a sentencing guidelines variable for clear error." *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003) (internal citations and references omitted). Questions of statutory interpretation are reviewed de novo. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d

860 (2003). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). When there is any evidence supporting the trial court's scoring decision it is not clearly erroneous and will be upheld. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003).

OV 7 should be scored at 50 points if a victim was treated with sadism. MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). The plain language of the statute does not require actual physical abuse, and emotional or psychological abuse that leads to humiliation will suffice. *People v Mattoon*, ___ Mich App ___; ___ NW2d ___ (2006).[2] Evidence was presented that both complainants were subjected to extreme or prolonged pain or humiliation. Specifically, both girls were sexually assaulted over a long period of time by defendant, their stepfather. Additionally, the assaults began at an early age for both girls, and they were told to keep the assaults secret for many years. Moreover, with regard to the fifteen-year-old victim, defendant used numerous objects including markers, pencils, pens, his penis, and his fingers in order to penetrate, degrade, and humiliate her. Undoubtedly, the assaults upon the girls were intended to provide defendant gratification. Therefore, defendant's conduct subjected the victims to prolonged humiliation and pain. MCL 777.37(3). Clearly, there was evidence in support of the trial court's scoring of OV 7. Thus, the scoring was not clearly erroneous. *Witherspoon*, *supra* at 335.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[2] Docket No. 259822, issued June 6, 2006, slip op p 2.